No. 98-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF NATIONAL WOMEN'S LAW CENTER AMERICAN ASSOCIATION OF UNIVERSITY WOMEN AMERICAN CIVIL LIBERTIES UNION, *et al.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

(Additional *Amici* Listed on Inside Cover)

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. TITLE IX'S PLAIN LANGUAGE, IMPLEMENTING REGULATIONS, AND AMENDMENTS ENACTED BY THE CRRA SUPPORT COVERAGE OF THE NCAA 5

A. Congress Intended Title IX to Have a Broad Reach, and Its Implementing Regulations, Which Are Entitled to Deference, So Provide 5

B. The NCAA Is a Recipient for Purposes of Title IX Coverage 9

1. The NCAA Indirectly Receives Federal Funds to Operate an Educational Program 10

2. The NCAA Serves as a Subunit, Successor, Assignee or Transferee of Recipients With Respect to Their Educational Programs and Activities 13

C. The Civil Rights Restoration Act Amendments to Title IX Underscore Coverage of the NCAA 17

1. The NCAA is Subject to Title IX Because It Is an Organization Established by Two or More Colleges or Universities That Receive Federal Funds 19

2. The NCAA is Subject to Title IX as an Operation of Its Federally Funded Member Schools 21

II. CONGRESS' INTENTION TO ELIMINATE SEX DISCRIMINATION IN INTERCOLLEGIATE ATHLETICS THROUGH TITLE IX SUPPORTS NCAA COVERAGE 23

A. Congress Explicitly Addressed Intercollegiate Athletics as Central to Title IX 24

B. Participating in Athletics Has Far-Reaching Benefits 27

CONCLUSION 30

APPENDIX A-1

TABLE OF AUTHORITIES

FEDERAL CASES

Association of Mexican-American Educators v. California, 836 F. Supp. 1534 (N.D. Cal. 1993) 22

Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) 8, 12

Bowers v. NCAA, 1998 U.S. Dist. LEXIS 85552 (D.N.J. June 8, 1998) 3, 20

Cannon v. University of Chicago, 441 U.S. 677 (1979) 8

Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) 28, 29

Communities for Equity v. Michigan High Sch. Athletic Ass'n, No. 1:98CV479, 1998 WL 804829 (W.D. Mich. Nov. 16, 1998) 27

Cureton v. NCAA, 1997 U.S. Dist. LEXIS 15529 (E.D. Pa. Oct. 8, 1997) 3, 20

Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663 (D. Conn. 1996) 12

Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1988) 16, 17

Graham v. Tennessee Secondary Sch. Athletic Ass'n, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb 20, 1995) 22

Grove City College v. Bell, 465 U.S. 555 (1984) ... 4, 7, 8, 12, 18

Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994) 11

Kungys v. United States, 485 U.S. 759 (1988) 20

National Collegiate Realty v. Bd. of County Comm'rs, 690 P.2d 1366 (Kan. 1984) 10

NCAA v. Califano, 444 F. Supp. 425 (D. Kan 1978) 16

NCAA v. Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984) 2

NCAA v. Tarkanian, 488 U.S. 179 (1988) 2, 10, 14

North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) 7

Pottgen v. Missouri State High Sch. Activities Ass'n, 857 F. Supp. 654 (E.D. Mo. 1994) 12

Sandison v. Michigan High Sch. Athletic Ass'n, 863 F. Supp. 483 (E.D. Mich. 1994) 12

Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1998). 11

United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986) 15, 16, 23

STATE CASES

NCAA v. Kansas Dep't of Revenue, 781 P.2d 726 (Kan. 1989) 14, 21

FEDERAL STATUTES

20 U.S.C. § 1681(a) 5

20 U.S.C. § 1682 12

20 U.S.C. § 1687 ..... *passim*

26 U.S.C. § 501(c)(3) 10

Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.* 5

Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988) 3

H.R. 5490, 99th Cong. (1984) 18

Higher Education Amendments of 1998, Pub. L. 105-244 (1998) 26

Pub. L. 93-380, § 509(a)(2), 88 Stat. 567, 20 U.S.C. § 1232(d)(1) (1970 & Supp. IV 1974) 7

Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974) 24

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* 5

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ..... *passim*

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* 5

LEGISLATIVE HISTORY

S. Cong. Res. 46, 121 Cong. Rec. 17,300 (1975) 25

S. Cong. Res. 52, 121 Cong. Rec. 22,940 (1975) 25

120 Cong. Rec. 20,668 (1974) 25

121 Cong. Rec. 20,714 (1975) 25

121 Cong. Rec. 23,846 (1975) 7

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H. Cong. Res. 310, 121 Cong. Rec. 19,209 (1975) 25

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Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. (1975) 24, 25

FEDERAL REGULATIONS

34 C.F.R. § 100.13(i) 6

34 C.F.R. § 104.3(f) 6

34 C.F.R. § 106.2(h) 4, 6

45 C.F.R. § 90.4(c)(2) 6

OTHER AUTHORITIES

18 Loy. L.A. Ent. L.J. 307 (1998) 3

1998-99 NCAA Division I Manual 2, 14

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U.S. Comm'n on Civil Rights, Pub. No. 63, *More Hurdles to Clear: Women and Girls in Competitive Athletics* (1980) . 26

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations dedicated to the achievement of equality of opportunity for all students without discrimination because of gender, race, national origin, disability or age.[1] Statements of interest of the *amici* are set forth in Appendix A.

INTRODUCTION

In this case, the National Collegiate Athletic Association ("NCAA") claims that it is not covered by the nondiscrimination requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"). It makes this claim despite the fact that the NCAA exists only as the creation of its member schools, the majority of which are federally funded and subject to Title IX, and despite the fact that its central function is to govern one of these schools' key educational programs, intercollegiate athletics, which Title IX was intended to address.

The member colleges and universities, now numbering about 1200, have chosen the NCAA as their coordinating vehicle for addressing athletics matters.[2] They have formalized this relationship with the NCAA through the payment of dues, which includes federal funds, and through other financial

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[1] The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] The NCAA promotes itself as "the organization through which the nation's colleges and universities speak and act on athletics matters at the national level." *The NCAA: General Information* (visited Nov. 30, 1998) <http://www.ncaa.org/about/>.

support,[3] in exchange for which the NCAA establishes rules of play and legislates upon many athletics-related issues of concern to its members. Member schools agree to abide by NCAA rules and assign to the NCAA the authority to enforce those rules on behalf of each individual school.[4] Sanctions for violating the rules range from prohibition from competition to termination of an institution's membership in the association.[5]

The vast authority assigned to the NCAA by its member schools is evidenced by NCAA legislation that affects virtually every aspect of a member institution's athletic program. From student eligibility requirements, to the maximum number of scholarships that may be awarded by sport and gender, to playing and practice seasons, member schools have transferred to the NCAA an enormous amount of control over their athletics programs.[6] It is beyond dispute that the NCAA is a

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[3] *1998-99 NCAA Division I Manual* 19, Const., Art. 3, § 3.7 [hereinafter *NCAA Manual*].

[4] *Id.* at 1, Const., Art. 1, § 1.2(d)&(h); § 1.3.2.

[5] *Id.* at 54, Bylaw, Art. 10, § 10.4 (ineligibility of a student athlete for intercollegiate competition); *id.* at 330, Bylaw, Art. 19, § 19.6.2.2(j) (prohibition of a team from competition); *id.* at 332, Bylaw, Art. 19, § 19.6.3 (termination or suspension of an institution's membership). The mere threat of sanctions is often enough to change an institution's ways. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 187 (1988) (noting that when faced with possibility of sanctions, university chose to "[r]ecognize [its] delegation to the NCAA of the power to act as ultimate arbiter of [the issue]"); *NCAA v. Regents of the Univ. of Oklahoma*, 468 U.S. 85, 94-95 (1984) (describing how College Football Association ("CFA") never consummated television agreement negotiated independently of NCAA because of threatened broad-based sanctions by NCAA against CFA members).

[6] *NCAA Manual* at 131-78, Bylaw, Art. 14 (eligibility); *id.* at 192-99, Bylaw, Art. 15 (scholarships); *id.* at 227-316, Bylaw, Art. 17 (playing and practice seasons).

dominant player in the operation of the educational program or activity of intercollegiate athletics in our nation's colleges and universities.[7]

Given this assignment of responsibilities for intercollegiate athletics to the NCAA by its member schools, and federal funding of the responsibilities at issue, the NCAA is subject to Title IX under the statute, its implementing regulations, and amendments enacted by the Civil Rights Restoration Act of 1987 ("CRRA"), Pub. L. 100-259, 102 Stat. 28 (1988).[8]

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[7] The NCAA's predominance in college athletics is widely acknowledged. *See* 18 Loy. L.A. Ent. L.J. 307, 328 (1998) ("[The] NCAA [has] unmitigated control over the market for college players."); 26 Loy. L.A. L. Rev. 1213, 1222 (1993) ("In terms of regulatory power, the NCAA is clearly the dominant organization in intercollegiate athletics."). While other athletic organizations exist, the NCAA is "the only entity with substantial power over intercollegiate athletics in the United States." *Id.* at 1222. The NCAA's prestige and the commercial opportunities it offers are powerful incentives for schools to obtain (and avoid losing) NCAA membership. *See* 31 J. Marshall L. Rev. 1303 n.102 (1998) ("[T]he question [is] whether anyone can afford to not be a member of the NCAA.").

[8] The posture of this case--dismissal pursuant to Federal Rule of Civil Procedure 12 (b)(6) and denial of the *pro se* plaintiff's motion to amend her complaint and allow for discovery--makes the factual record very slim. While the public record illustrates many underlying facts confirming the NCAA's coverage under Title IX, the information in the record of this case concerning the nature and purposes of federal funding received by the member schools, and the relationship of those funds to the NCAA and its responsibilities to the schools, is not fully developed. For example, two cases indicate that the NCAA is a potential direct recipient of a federal grant. *See Bowers v. NCAA*, 1998 U.S. Dist. LEXIS 85552, at *106-08 (D.N.J. June 8, 1998); *Cureton v. NCAA*, 1997 U.S. Dist. LEXIS 15529, at *6 (E.D. Pa. Oct. 8, 1997). Other relevant funds to the schools and the NCAA might also emerge were the plaintiff able to amend her complaint and proceed to discovery, as the Third Circuit decision allows.

STATEMENT OF THE CASE

Amici adopt the Respondent's Statement of the Case.

SUMMARY OF ARGUMENT

1. Title IX's plain language, implementing regulations, and amendments enacted by the CRRA support coverage of the NCAA. Title IX covers indirect as well as direct recipients of federal funds, and also covers entities that themselves may not receive federal funds but are subunits, successors, assignees or transferees of a recipient and stand in the shoes of the recipient with like obligations and functions. *See Grove City College v. Bell*, 465 U.S. 555 (1984); 34 C.F.R. § 106.2(h).

The NCAA is an indirect recipient of federal funds, because of dues received from its federally funded member colleges and universities to operate a part of their intercollegiate athletics programs that the federal funds support. These colleges and universities receive federal student financial aid that Congress intended for the general support of all the educational activities of the schools, including intercollegiate athletics.

Because the recipient colleges and universities have assigned and transferred key responsibilities to the NCAA to operate their intercollegiate athletics programs, and because the NCAA stands in the shoes of the recipients for purposes of governing their athletics programs, the NCAA is covered even if no federal funds are transferred through dues or otherwise.

The CRRA confirms that the NCAA is covered by Title IX. The NCAA is an entity created by two or more covered entities (the member colleges and universities), and hence is covered under subsection (4) of the CRRA. It is also covered under subsection (2) of the CRRA as a part of the operations of the covered schools themselves. All of the schools' operations are covered under subsection (2), regardless of whether the operations receive federal funds, and regardless of whether the

schools run the operations themselves or delegate this responsibility to another entity such as the NCAA. These schools have arranged for the NCAA to run key aspects of their intercollegiate athletic programs, and therefore the NCAA is covered under this provision as well. 20 U.S.C. § 1687 (2),(4).

2. Congress intended to eliminate sex discrimination in athletics by enacting Title IX. The legislative history demonstrates that Congress repeatedly reaffirmed Title IX's coverage of intercollegiate athletics. The importance of equality in athletics to women's education, employment opportunities, and health was recognized by Congress in its design of and support for Title IX. Thle NCAA's dominant role in intercollegiate athletics supports its coverage under Title IX.

ARGUMENT

I. TITLE IX'S PLAIN LANGUAGE, IMPLEMENTING REGULATIONS, AND AMENDMENTS ENACTED BY THE CRRA SUPPORT COVERAGE OF THE NCAA

A. Congress Intended Title IX to Have a Broad Reach, and Its Implementing Regulations, Which Are Entitled to Deference, So Provide

Congress enacted Title IX to prohibit sex discrimination in federally funded education programs and activities. By its own terms, Title IX's reach is expansive, stating simply: "No person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[9] 20 U.S.C. § 1681(a).

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[9] Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 all prohibit discrimination under programs or activities receiving federal financial assistance. *See* 42 U.S.C. § 2000d *et seq.* (Title VI); 29 U.S.C. § 794 *et seq.* (Section 504); 42 U.S.C. § 6101 *et seq.* (Age Discrimination

Congress has consistently demonstrated its intention that the determination of what is a program or activity receiving federal funds be made according to principles of broad coverage.[10]

Under Title IX's implementing regulations, a "recipient" of federal funds is defined as:

> any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h).[11]

This definition of "recipient" includes entities that receive federal funds directly or indirectly and operate an education program or activity that receives or benefits from such assistance. It also includes subunits, successors, assignees and transferees of such recipients.[12] The regulation defining

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Act).

[10] The Brief for Respondent Smith reviews the broad statutory language used in Section 1681(a), which protects persons from discrimination under any federally funded program or activity, without limiting the protection to discrimination caused by the recipient itself. Thus, *amici* do not address this issue here.

[11] The regulations under Title VI, Section 504, and the Age Discrimination Act define "recipient" similarly. *See* 34 C.F.R. § 100.13(i) (Title VI); 34 C.F.R. § 104.3(f) (Section 504); 45 C.F.R. § 90.4(c)(2) (Age Discrimination Act).

[12] This brief does not focus on the NCAA's direct receipt of funds, although there is highly relevant evidence that the NCAA receives federal funds directly for its National Youth Sports Program. This

recipient has been approved by Congress and given deference by this Court since its adoption in 1975.[13]

At the time that the regulations were promulgated, the General Education Provisions Act[14] was in place, under which Congress was afforded an opportunity to disapprove any of the Department of Health, Education and Welfare's ("HEW") regulations[15] that it thought were inconsistent with Title IX. Congress reviewed the regulations, neither House passed a disapproval resolution, and the regulations went into effect. *See North Haven*, 456 U.S. at 533 n.24; 121 Cong. Rec. 23,846 (1975). Congress' failure to disapprove the regulations "strongly implies that the regulations accurately reflect congressional intent." *Grove City*, 465 U.S. at 568.

Relying in part on the legislative history and the broad wording of Title IX itself, this Court ruled that the indirect receipt of federal funds triggers Title IX coverage. *See Grove City*, 465 U.S. 555 (holding that indirect receipt of federal funds through federal assistance to students triggers Title IX coverage of the college). In response to Grove City College's argument that none of its programs directly received any federal

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evidence is addressed in Respondent Smith's brief as well as in Brief for *Amici Curiae* Trial Lawyers for Public Justice ("TLPJ") and Southern Poverty Law Center ("SPLC").

[13] This Court has accorded the Title IX regulations particular deference as an interpretation of the statute. *See Grove City College v. Bell*, 465 U.S. 555, 567-68 (1984).

[14] Pub. L. 93-380, § 509(a)(2), 88 Stat. 567, 20 U.S.C. § 1232(d)(1) (1970 & Supp. IV 1974).

[15] The former HEW promulgated the regulations initially in 1975. HEW's functions under Title IX were transferred in 1979 to the Department of Education ("DOE"), which subsequently adopted the regulations without substantive changes. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 515-17 & nn.4&5 (1982).

assistance, this Court noted that the language of the statute does not indicate that Congress perceived any difference between direct and indirect federal assistance:

> Nothing in § 901(a) suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation.

Id. at 564. Citing its own precedent that Title IX should be "accord[ed] a sweep as broad as its language," *North Haven*, 456 U.S. at 521, this Court in *Grove City* refused to read into Title IX "a limitation not apparent on its face." *Id.* at 564; *see also Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (stating that narrow readings of Title VI coverage are inappropriate).[16]

Congress later expressly endorsed the longstanding definition of "recipient" when it passed the CRRA. Congress stated clearly its intent that the CRRA does not "change in any way who is a recipient of federal financial assistance," and stated that the "purpose of the Civil Rights Restoration Act of 1987 is to reaffirm the pre-*Grove City College* judicial and executive branch interpretations [of Title IX's scope] and enforcement practices which provided for broad coverage of the

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[16] Because Title IX was patterned after Title VI, *see Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), Congress was aware of how Title VI's regulations were being interpreted and could have changed Title IX if it had so desired. Its failure to do so provides further evidence of its approval of Title IX's definition of recipient. *See id.* at 694-95 ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

antidiscrimination provisions of [the] civil rights statutes." Report of the U.S. Senate Comm. on Labor and Human Resources, 100th Cong., 1st Sess., at 2 (1987).

In addition to the clear intention that the indirect receipt of federal funds trigger coverage, the meaning of the terms "subunit, successor, assignee, or transferee thereof" was debated in early versions of the CRRA. These terms were explained as "standard contract language applied to situations in which the successor, assignee, or transferee stands in the shoes of the recipient of the federal financial assistance, with like obligations and functions of the recipient." *See, e.g.*, H.R. Rep. No. 98-829, Pt. 2, at 32 (1984) [hereinafter House Comm. Rep.]. Again Congress demonstrated that it was aware of this part of the regulation and approved of it.[17]

B. The NCAA Is a Recipient for Purposes of Title IX Coverage

The NCAA fits within this regulatory definition of "recipient" on two counts. It indirectly receives federal funds for an educational program, intercollegiate athletics, which it operates. It also serves as a subunit, successor, assignee or transferee of other recipients -- its member schools.

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[17] The House Report cites an example in which a City Housing Authority receives Community Development Block Grants from the federal government. If the Housing Authority then subcontracts the property rehabilitation work to a private developer, the developer would come within the "successor, assignee or transferee" clause and hence would be covered by Title VI, Section 504, and the Age Discrimination Act. The report explains, however, that indirect recipients resulting from transactions outside the purpose of the federal funds would not be covered under this provision. For example, that same Housing Authority's payment of an electric bill does not subject the Electric Company to the nondiscrimination statutes, because the payment of the bill is unrelated to the function for which the federal funds were given to the Housing Authority.

1. The NCAA Indirectly Receives Federal Funds to Operate an Educational Program

It is beyond dispute that the NCAA operates an educational program--intercollegiate athletics--within the meaning of Title IX. Despite the NCAA's protestations to the contrary, it also receives federal funds from its member schools precisely to operate this educational activity.

The NCAA's central role is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body." *Tarkanian*, 488 U.S. at 182.[18] It is to support this central role that the member schools pay dues to the NCAA, and federal funds received by the schools may cover just such purposes. Almost all NCAA members receive federal student financial aid that Congress has explicitly intended for the general support of all of the member schools' educational programs and activities -- of which intercollegiate athletics is one. *See* S. Rep. 100-64 at 20 (stating that "funds from [student federal aid] flow throughout the institution and support all of its programs").[19] Because its member schools have delegated to the NCAA key aspects of the operation of their intercollegiate athletic programs and because they pass on federal funds intended to support all educational activities, including intercollegiate athletics, to the

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[18] The NCAA is treated as a tax-exempt organization operated exclusively for educational purposes. *See National Collegiate Realty v. Bd. of County Comm'rs*, 690 P.2d 1366 (Kan. 1984) (NCAA stated before the Kansas Board of Tax Appeals that it is a § 501(c)(3) organization); 26 U.S.C. § 501(c)(3) (granting tax-exempt status to corporations organized and operated exclusively for educational purposes).

[19] It is difficult to determine, given the posture of this case, whether there are other federal funds flowing from its member schools to the NCAA.

NCAA in the form of dues to do so, the NCAA is an intended recipient covered by Title IX. Contrary to the NCAA's assertion, the member schools' extension of federal funds to the NCAA in exchange for its governance of their athletic programs does not "violate the terms on which the aid was extended to the institution." Pet. Br. at 20. The NCAA member schools' use of student aid money, once received by them, is not restricted in any way by the federal government.[20]

Lower courts have relied on this regulatory definition of "recipient" to hold athletic associations similar to the NCAA accountable under Title IX. In *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994), the Sixth Circuit held the Kentucky High School Athletic Association subject to Title IX because it received dues from its federally funded member schools and performed the functions of the Kentucky Board of Education with respect to interscholastic athletics.[21] Other courts have followed suit, holding athletic associations and

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[20] Even looking at federal student aid funds more narrowly as going to the financial aid program alone, by its own admission, the NCAA is responsible for key parts of the financial aid programs of each of its member colleges and universities. Pet. Br. at 5. It sets ceilings on the number, amount, and terms of scholarships for student athletes at its member schools. As the CRRA's legislative history demonstrates, when a college participates in a federal student aid program, the intended recipient of the aid is the college as a whole. However, even under the narrowest reading that the intended recipient is only the college's financial aid program, given its assigned authority for a central component of the financial aid program for student athletes, the NCAA is an "intended recipient" of federal financial aid.

[21] In *Horner*, the Kentucky Board of Education delegated the management of interscholastic athletics to the Kentucky High School Athletic Association pursuant to a state statute. *See* 43 F.3d at 272. Clearly, Title IX coverage does not turn on whether the delegation of responsibility for managing an education program is by statute, or by voluntary agreement, as in the case of the NCAA. *See Smith v. NCAA*, 139 F.3d 180, 188 (3rd Cir. 1998).

conferences subject to Title IX by virtue of their indirect receipt of federal funds and their responsibilities for governing member schools' interscholastic athletic programs. *See, e.g., Dennin v. Connecticut Interscholastic Athletic Conference*, 913 F. Supp. 663 (D. Conn. 1996), *appeal dismissed as moot*, 94 F.3d 96 (2d Cir. 1996) (holding athletic conference subject to Section 504); *Sandison v. Michigan High Sch. Athletic Ass'n*, 863 F. Supp. 483 (E.D. Mich. 1994), *rev'd in part on other grounds*, 64 F.3d 1026 (6th Cir. 1995) (holding athletic association subject to Section 504); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 857 F. Supp. 654 (E.D. Mo. 1994), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1994) (same).[22]

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[22] The NCAA argues that it is not covered by Title IX because the remedy of fund termination is unavailable. The NCAA is wrong, both because fund termination is possible in the case of the NCAA, just as it is in other indirect recipient circumstances, and because fund termination is not necessary for coverage in any event. The CRRA makes clear that coverage of an institution is broader than the particular part receiving federal funds, and under the "pinpoint" fund-termination provision of Section 902(1), only the particular funds supporting the discrimination may be terminated. Section 902(2) provides for a second way of enforcement beyond fund termination - by any other means authorized by law. 20 U.S.C. § 1682. Such means have included referral of the matter to the Department of Justice for court action. In the event of a Justice Department enforcement action, no fund termination is at issue. Moreover, as an indirect recipient, the NCAA's funds would be terminated in the same way that a university that receives indirect funding through student financial assistance would have its funds terminated. In the latter situation, the student receiving the federal financial assistance would not be able to use those funds to attend the discriminating university. *See Grove City* and *Bob Jones University*. Similarly, the NCAA's indirect funding could be terminated by banning member recipients from providing financial support to the NCAA in exchange for the NCAA's governance of their intercollegiate athletics program. Of course, in practice, voluntary compliance with the law is the way almost all compliance is secured, with Justice Department actions or fund termination proceedings extremely rare under any of the civil rights statutes.

2. The NCAA Serves as a Subunit, Successor, Assignee or Transferee of Recipients With Respect to Their Educational Programs and Activities

The NCAA, in its role of governing and regulating intercollegiate athletics, also acts as a subunit, successor, assignee or transferee of its federally funded member schools and hence is a recipient within the meaning of Title IX in this respect as well. The NCAA fits this part of the regulatory definition of recipient because member schools, which are recipients themselves, delegate their functions with respect to intercollegiate athletics to the NCAA. It is unnecessary to meet this part of the regulation for any transfer of federal funds to have taken place at all.[23]

There can be no doubt that the NCAA is a surrogate for its member colleges and universities and substantially controls the operation of their intercollegiate athletic programs. As one court stated, in a case in which the NCAA itself claimed that it was an educational institution, based on its relationship with its member schools, and was thus entitled to a sales tax exemption:

> The activities of the NCAA are of the type the

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[23] When reviewing this part of the regulation defining recipient, the House Report used the particularly instructive example of a parking garage in a university-owned building financed with federal funds, which was leased by the university to a private operator. In that example, the university presumably did not give funds to the garage operator. In fact, the lease would have yielded funds from the operator to the university. Nonetheless, even without any transfer of federal funds, the garage operator was covered by Title IX as it was operating a part of the federally funded building for the recipient just as the NCAA is operating a part of its members' federally funded educational programs. *See* House Comm. Rep. at 32.

> member universities and colleges could accomplish by committee except for the number of schools involved and the complexity of the world of major intercollegiate sports. The work of the NCAA staff is that which the members have decreed it shall do for the mutual benefit of, and assistance to, the member institutions' educational programs. We must conclude that the NCAA is but an extension of the member universities and colleges . . . .

NCAA v. Kansas Dep't of Revenue, 781 P.2d 726, 730 (Kan. 1989). Likewise, this Court recognized in *Tarkanian* that NCAA rules and enforcement procedures "are an essential part of the intercollegiate athletic program of each member institution." *Tarkanian*, 488 U.S. at 195. The source of the NCAA's regulations is not any one member school, "but the collective membership speaking through [its] organization." *Tarkanian*, 488 U.S. at 193.

Member institutions have formally assigned or transferred functions with respect to athletics to the NCAA and have agreed to be bound by the rules and regulations of the NCAA. In addition to delegating to the NCAA the responsibility for managing intercollegiate athletics, member schools have paid dues and have assigned or transferred many rights to the NCAA, such as their rights to money from championship events, including money from ticket sales; program sales and advertising; radio, television and movie rights, and more. *See NCAA Manual* at 419-20, Art. 31, § 31.4.2. The individual schools are only entitled to a small allowance of the net receipts from these events. *See id.* at 420, § 31.4.4.1. According to its own brief, "the NCAA funds its activities through the receipt each year of approximately $200 million in revenues from television royalties, championship events, and various sales and services." Pet. Br. at 4. All of this money would be retained by the NCAA's member schools if they did not delegate control over

the governance of their athletic programs to the NCAA.[24]

The NCAA's contention that subjecting it to Title IX would mean that virtually everyone who does business with a recipient will be covered, is belied by the language of the statute and regulations, as well as the legislative history. As the 1984 House Committee Report indicates, the performance of obligations flowing from transactions outside the purpose or character of the federal funds does not trigger coverage of the successor, assignee, or transferee. *See* House Comm. Rep. at 32. However, here, the assignment and transfer of obligations to the NCAA from colleges and universities receiving federal assistance are clearly for the purpose of providing an educational program or activity supported by federal funds.[25] Therefore, the NCAA, as a subunit, successor, assignee, or transferee providing the educational intercollegiate athletics program, is covered by Title IX.

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The NCAA's reliance on *United States Department of*

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[24] Given that the great bulk of the NCAA's revenues comes from money that its member schools would have otherwise kept, its statement that it receives only about $900,000 in dues annually understates substantially the financial support flowing from its members.

[25] In fact, an enormous loophole would be created were an entity such as the NCAA not considered covered and the implications would be contrary to common sense and Title IX's fundamental purposes. For example, if several universities jointly managed an archaeological dig and appointed a joint governing body to administer the research and to control the number of students from each school who would be allowed access to the site and the maximum amount of student aid each researcher could receive, that joint governing body could no more discriminate based on sex than could any of the universities involved in the research. This result would be the same regardless of whether the governing body received funds from the universities, charged the students directly, or received other sources of funds.

Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), to support exempting the NCAA from coverage of Title IX is misplaced. In *Paralyzed Veterans*, this Court held that commercial airlines were not subject to Section 504 despite their benefitting--in the form of runways, taxiways, and ramps--from federal funds extended to airport operators. *See* 477 U.S. at 606-07. In contrast with this case, there was no contention in *Paralyzed Veterans* "that [the] airlines actually receive or are intended to receive money from the [federal government]." In fact, this Court found that "[n]ot a single penny of the money is given to the airlines." Id. at 605. The NCAA, in contrast, is an actual indirect recipient of federal student aid funds intended to support all educational activities of the schools, through the dues the schools pay NCAA to operate one of their educational activities.

In addition, the NCAA is a subunit, assignee, or transferee of its recipient member schools entrusted to govern key aspects of their athletic programs, while the airlines in *Paralyzed Veterans* did not govern any of the operations of the airport. While the airlines in *Paralyzed Veterans* merely used the federally funded facilities, the NCAA controls and regulates how the federal recipients' intercollegiate athletic programs will operate.[26]

Moreover, the NCAA's reliance on this Court's decision in *Gebser v. Lago Vista Independent School District*, 118 S. Ct.

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[26] The NCAA's reliance on *NCAA v. Califano*, 444 F. Supp. 425 (D. Kan 1978), *rev'd*, 622 F.2d 1382 (10th Cir. 1980), is also misplaced. In *Califano*, the issue of whether the NCAA was a recipient was not explored, no factual record was developed, and no review of legal principles was conducted regarding the NCAA's recipient status. An exploration of the actual facts would have revealed that at the time, the NCAA received federal funds directly for its National Youth Sports Program, as discussed in Brief for *Amici* TLPJ and SPLC, and therefore was clearly a recipient, under even the narrowest meaning of the term.

1989 (1988), is also unavailing. In *Gebser*, there was no doubt that the school was a recipient; the question before the Court was when a recipient could be held liable for damages based on the misconduct of its agent. *See id.* The court held that a school district would not be held liable in damages as a *respondeat superior* for the conduct of an employee who sexually abused a student, unless an official of the school district with the authority to initiate corrective measures had actual notice of the discriminatory conduct. *See id.* at 1998-99. The Court's standard for damages, however, does not control the issue of coverage, or even the issue of other forms of relief beyond damages, including administrative enforcement that would flow from recipient status. *See id.* at 2000. Moreover, the NCAA is allegedly the knowing, discriminatory actor, not the unknowing management structure removed from the discrimination that existed in *Gebser*. Rather than precluding Title IX coverage, the Court's *Gebser* opinion invites it in this case. Under the Court's *Gebser* analysis, control and knowledge, which the NCAA clearly has regarding its own rules, triggers liability for damages beyond the question of coverage.[27]

C. The Civil Rights Restoration Act Amendments to Title IX Underscore Coverage of the NCAA

While for the reasons described above, the NCAA is a recipient within the meaning of Title IX, after the passage of the CRRA, with the new definition of "program or activity receiving federal financial assistance," it fits within that rubric as well.

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[27] The NCAA also mischaracterizes Smith's statement in her Brief in Opposition that the NCAA acts as an agent of its member schools as being based on a theory of agency or vicarious liability. *See* Br. Opp. at 7; Pet. Br. at 26-28. The reference to "agent," conveyed a relationship between the NCAA and its member schools analagous to the regulation's "subunit, successor assignee or transferee" language. As discussed *supra*, the NCAA stands in the shoes of its member schools with respect to the governance of intercollegiate athletics and hence fits within the regulatory definition of recipient.

While Congress in enacting the CRRA supported the holding in *Grove City College v. Bell* that student receipt of federal financial assistance led to Title IX recipient status for the school attended by the student, it disagreed with the Court's holding that the financial aid program, and not the school as a whole, was covered under Title IX. Thus, the *Grove City* decision prompted a strong congressional response. Within weeks of the Court's decision, bills were introduced in Congress to overturn that aspect of the Court's *Grove City* decision. *See, e.g.*, H.R. 5490, 99th Cong. (1984). The CRRA, was enacted into law three years later. 20 U.S.C. § 1687.

The CRRA broadly defines a "program or activity" that receives federal funds to mean all of the operations of a list of entities -- including colleges and universities; private organizations principally engaged in education; and any other entity established by two or more of the listed entities what Congress termed the "catch-all" provision.[28]

The language, structure and intent of Congress in passing the CRRA was clear - to ensure that a broad range of entities were covered in their entirety, when they have responsibility for federally funded programs.[29] In fact, the NCAA clearly fits

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[28] *See* S. Rep. 100-64 at 19.

[29] The CRRA provides in relevant part:

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of–

. . . .

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship–

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

within the CRRA. The NCAA acknowledged as much in its testimony at hearings when Congress first began consideration of the legislation. In a prepared statement submitted for the record, the NCAA stated its belief that if Congress adopted a scheme whereby federal financial assistance to one university's program extended Title IX coverage to the university's other programs, by analogy, voluntary athletic associations such as the Big Eight Athletic Conference would be covered.[30] While the NCAA did not explicitly mention its own status, its concerns regarding the coverage of voluntary athletic associations were based on a proper reading of Congress' purposes and the effect of the CRRA once passed.

1. The NCAA is Subject to Title IX Because It Is an Organization Established by Two or More Colleges or Universities That Receive Federal Funds

The "catch-all" provision, subsection (4) of the CRRA, provides that an entity created by two or more otherwise covered entities is itself subject to Title IX. The NCAA is clearly

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(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance . . . .

20 U.S.C. § 1687.

[30] *See Hearings Before the House Education and Labor Comm. and the Subcomm. on Civil and Constitutional Rights*, House Judiciary Comm., 98th Cong., 2d Sess. at 225 (May 21, 1984). [hereinafter *1984 Joint Hearings*].

such an entity, as it was established by colleges and universities that are explicitly listed in the CRRA as covered themselves. *See* 20 U.S.C. § 1687(2)(A).

Pursuant to this catch-all provision, lower courts have held the NCAA, liable under Title VI and Section 504. In *Cureton v. NCAA*, the court held the NCAA to be a program or activity covered by Title VI under subsection 4. 1998 U.S. Dist. LEXIS 16196, at *6 and in *Bowers v. NCAA*, the court held that the NCAA is a program or activity subject to Section 504 because it "squarely fits within the statutory language of [subsection (4)]" as an entity established by two or more colleges and universities. 1998 U.S. Dist. LEXIS 8552, at *96-*98.

The NCAA claims that before an organization can be brought under Title IX's coverage by subsection (4), the organization must itself receive federal financial assistance. Pet. Br. at 31. But this interpretation should be rejected because it would render subsection (4) mere surplusage. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion) (Scalia, J.) (It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). Subsections (3)(A) and (3)(B), when taken together, already apply Title IX to *any* private organization if *any* part of that organization is extended federal financial assistance directly. For example, if two separate universities form a corporation, and the government extends federal financial assistance to the corporation directly, that corporation is subject to Title IX under subsection (3)(A)(i) or (3)(B). The NCAA's interpretation would render subsection (4) unnecessary because the organization would already be covered because of the federal assistance it receives directly.[31] Thus, the NCAA is covered by

[31] The example within the CRRA's legislative history that the NCAA cites for the proposition that entities covered under subsection (4) must receive federal financial assistance directly to be covered by Title IX is inapposite. The NCAA refers to the example offered in S. Rep. 100-64 concerning three Catholic parishes within one Catholic diocese. In the

Title IX under subsection (4): a contrary conclusion would be inconsistent with Congress' goal of "meaningful coverage and effective enforcement" of Title IX, S. Rep. 100-64 at 6, and its explicit purpose, that subsection (4) serve as a catch-all provision and apply to entities not reached by the other enumerated subsections.

2. The NCAA is Subject to Title IX as an Operation of Its Federally Funded Member Schools

Subsection (2) covers all operations of covered colleges and universities. If the NCAA disputes that it is a separate creation of its covered member schools, and thereby covered under subsection (4), it would be hard pressed to argue that it was not an operation of the schools themselves, as its own testimony seemed to recognize.[32]

The fact that the NCAA's members choose to conduct some part of the operations of their covered educational program by

example, each parish separately receives federal assistance. The report concludes that the diocese to which the parishes belong is not covered under § 1687(4). The reason the diocese is not covered while its three parishes are, however, is that under subsection (3)(B), if federal aid is extended only to a facility or division of a corporate entity, only that facility or division is covered by Title IX. The parishes constitute separate facilities under the "geographically separate facility" provision of subsection 3(B) and are not separate organizations with legal identities distinct from the dioceses. By contrast, the schools that make up the NCAA have legally distinct identities, which they retain while still being "parts" of the NCAA.

[32] *See 1984 Joint Hearings* at 225, where it described voluntary athletics associations as operations of colleges and universities. See also the statement of the court in *NCAA v. Kansas Dep't of Revenue*, 781 P.2d at 730 ("We must conclude that the NCAA is but an extension of the member universities and colleges.").

arrangement with the NCAA rather than by themselves does not make the NCAA's role and responsibilities any less an operation of the schools. The NCAA's central role in the management of each member schools' athletic programs makes the NCAA a part of the operation of each member school within the meaning of the CRRA.

Courts have held analogous entities to be covered as operations of covered schools themselves, even when those entities were separate from the schools. *See Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95 CV044, 1995 WL 115890 (E.D. Tenn. Feb 20, 1995), *appeal dismissed*, 107 F.3d 870 (6th Cir. 1997) (upholding Title VI claim against the athletic association because it is an operation of the state's schools); *Association of Mexican-American Educators v. California*, 836 F. Supp. 1534, 1542-45 (N.D. Cal. 1993) (upholding Title VI claim against California Commission on Teacher Credentialing, which did not directly receive federal funds, because it is as an operation of the state's school system, which receives federal funds).

It is the member schools whose athletics operations the NCAA relies on to generate revenues, and to provide facilities and participants for events. In its brief, the NCAA pointed to the $200 million in revenues for selling the rights to broadcast the NCAA events. Pet. Br. at 4. These events are intercollegiate athletic competitions between federally funded student athletes at federally funded schools. For example, when millions of viewers around the world watch the NCAA's "Final Four" national basketball championship, and increasingly the Women's "Final Four," they do so to watch their favorite colleges, universities, and student-athletes compete. It is the member schools' operations, and their students that the NCAA is supervising and upon which it relies.

But for the federally funded schools that build, maintain, and operate the facilities in which these contests occur and pay for the salaries of the coaches, assistants, and trainers who

manage these teams, there would be no NCAA championships. But for the federally assisted student athletes who are extended federal financial assistance, there would be no teams to compete and no NCAA championship games to be broadcast. But for the federally funded member schools that pay for the NCAA, and abide by its rules, there would be no NCAA. Thus, the NCAA is subject to the antidiscrimination requirements of Title IX because it is controlling central aspects of the schools' educational operations.[33]

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In sum, the CRRA ensured that substance must prevail over form, and that if an entity is responsible for discrimination under a program or activity receiving federal funds – as the NCAA is alleged to be in its waiver practices in this case – it must be held accountable under Title IX.[34]

II. CONGRESS' INTENTION TO ELIMINATE SEX DISCRIMINATION IN INTERCOLLEGIATE ATHLETICS THROUGH TITLE IX SUPPORTS NCAA COVERAGE

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[33] In fact, it is also possible to view the NCAA as covered under subsection (3)(A)(ii) of the CRRA, for it is without question a private educational organization. Its member schools are the NCAA's parts, and given the schools' receipt of federal funds, the NCAA as a whole is covered.

[34] While the NCAA correctly states that the CRRA left in place the *Paralyzed Veterans* holding that the airlines in that case were not recipients of federal financial assistance for purposes of Section 504, the airlines did not fit within subsection (4), for they were not created by the covered airport operators. Nor were the airlines a part of the airport operators running operations for them, as is necessary for coverage under subsection (2) in the case of colleges and universities.

A. Congress Explicitly Addressed Intercollegiate Athletics as Central to Title IX

The legislative history of Title IX is characterized by Congress' repeated rejection of attempts to weaken its application to intercollegiate athletics and by Congress' recognition of the need to remedy sex discrimination in intercollegiate athletic programs. Intercollegiate athletics has been a major focal point in congressional debates relating to Title IX. In 1974, for example, Congress not only rejected a proposal to exempt revenue-producing intercollegiate athletic programs, but actually directed the Secretary of HEW to prepare regulations implementing Title IX which included "with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports."[35] Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *see also Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor*, 94th Cong., 1st Sess., at 21 (1975) [hereinafter *Sex Discrimination Regulations*] (describing the relevant history).

Acting on this explicit delegation of rulemaking authority, HEW issued proposed regulations in June of 1974, including specific provisions addressing intercollegiate athletics. The proposed regulations were subjected to a public comment period that produced nearly 10,000 comments. *See Sex Discrimination Regulations* at 438 (testimony of Caspar Weinberger). The large number of comments addressing intercollegiate athletics prompted then-Secretary of HEW Caspar Weinberger to remark that "the most important issue in the United States today is intercollegiate athletics, because we

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[35] Subsequent efforts to restrict Title IX's coverage of intercollegiate athletics also failed. *See* H.R. 8394, 94th Cong., 121 Cong. Rec. 21,685 (1974) (bill amending Title IX to protect revenue produced by an athletic team from use by any other team unless the first team did not need the funds for itself); S. 2106, 94th Cong., 121 Cong. Rec. 22,778 (1975) (bill amending Title IX to exempt revenue-producing sports).

have an enormous volume of comments about them." *Id.*

HEW issued its final regulations in 1975, and Congress held extensive hearings on the regulations, focusing particular attention on the need to address the pervasive sex discrimination in intercollegiate athletics programs. The hearings produced a voluminous record documenting such discrimination.[36] *See Sex Discrimination Regulations, supra.*

Resolutions were introduced in both Houses disapproving the regulations insofar as they applied to athletics, *see* S. Cong. Res. 52, 121 Cong. Rec. 22,940 (1975); H. Cong. Res. 311, 121 Cong. Rec. 19,209 (1975), and in their entirety, *see* H. Cong. Res. 310, 121 Cong. Rec. 19,209 (1975); S. Cong. Res. 46, 121 Cong. Rec. 17,300 (1975). None of the resolutions passed, and the regulations went into effect on July 21, 1975. *See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (1979) (summarizing relevant history)

Title IX's application to intercollegiate athletics has enhanced educational opportunities for young women in many

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[36] Many members of Congress spoke to this issue. *See Sex Discrimination Regulations* at 175 (remarks of Sen. Bayh) ("I have heard of no one making the argument that athletics should not be covered by Title IX who does so on the premise that there is not discrimination."); *see also id.* at 58 (remarks of Mr. Simon) ("I think we have to recognize that we have had some failures here in the past in not encouraging female sports."); 121 Cong. Rec. 24,035 (1975) (remarks of Sen. Clark) ("A look at present spending figures reveals an unbelievable inequity -- of the $300 million spent annually on collegiate athletic programs, only 2% is spent on women's athletics."); 121 Cong. Rec. 20,714 (1975) (remarks of Sen. Javits) ("Sex discrimination in education takes many forms . . . . [A]thletic programs are restricted and financial aid distributed in a biased manner."); 120 Cong. Rec. 20,668 (1974) (remarks of Hon. Robert P. Hanrahan) ("Mr. Speaker, there has always been sex discrimination involved in athletics.").

respects. Title IX has led to the availability of athletic scholarships, and they in turn have sharply increased the ability of young women to pursue a college education and to choose from a wider range of schools. Athletic scholarships for women were almost nonexistent and many colleges had no women's sports programs at all. *See* U.S. Comm'n on Civil Rights, Pub. No. 63, *More Hurdles to Clear: Women and Girls in Competitive Athletics* (1980). Prior to the passage of Title IX, only 32,000 women per year played college sports. *See* 44 Fed. Reg. 71,413, 71,419 (1979). Currently over 110,540 women participate in college athletics. NCAA, *Participation Study* (1995).

Despite these increased opportunities, however, the full potential of Title IX in the area of intercollegiate athletics has not yet been realized. Recognizing the need for continued enforcement of Title IX, Congress continues to legislate in this area. For example, in 1998 the "Fair Play Act" was passed, requiring the public availability of data describing the degree of compliance with Title IX's mandate of equal opportunity in intercollegiate athletics. Higher Education Amendments of 1998, Pub. L. 105-244 (1998). Congress found that despite the important advances made under Title IX, women have not yet achieved equity in intercollegiate athletics. The data has shown that many problems remain, and in the area of scholarship inequities, for example, schools have pointed to NCAA scholarship rules as creating barriers to the removal of the inequities, *See, e.g.*, Jim Naughton, *Focus of Title IX Debate Shifts from Teams to Scholarships*, Chron. of Higher Educ., May 29, 1998, at A45.

In order to implement Congress' intent in enacting Title IX, coverage of the NCAA is particularly important. The instant case highlights that importance, for the challenged conduct is a rule or decision by the NCAA itself -- its manner of granting eligibility waivers -- not the action of any individual school.

Moreover, the argument that coverage of the NCAA is unnecessary because effective relief can be obtained from an

individual federally funded school, which must comply with Title IX notwithstanding the NCAA's rules, ignores the very real consequences of violating NCAA rules. Schools are subject to sanctions for so doing, including prohibition from competition or termination of membership. Thus, even if a plaintiff obtained a judgment ordering a particular school not to implement a discriminatory NCAA rule, that judgment would not restrict the NCAA, and the school then would be subject to sanctions by the NCAA and would be excluded from NCAA-sponsored competition. In the end, therefore, the plaintiff and other athletes at the institution might lose valuable opportunities for participation and competition, and not secure effective relief.[37]

Thus, subjecting the NCAA itself to Title IX is essential to achieving the statute's purposes. Any decision to the contrary would frustrate Congress' intent to eliminate sex discrimination in athletics.

B. Participating in Athletics Has Far-Reaching Benefits

Sports offer much to female athletes who participate in them in a variety of ways. In 1997, the President's Council on Physical Fitness and Sport released a report on girls' involvement in physical activity and sports. The report affirmed the basic premise that sports and physical activities

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[37] In fact, in a pending case against the Michigan Athletic Association, plaintiffs have alleged that several school districts have protested unsuccessfully to the association to change a rule which schedules tournament play for certain women's teams off season. These school districts are faced with the choice of withdrawing from the tournaments or acquiescing in a discriminatory practice hurting their female students' opportunities for scholarships and other benefits that in-season tournaments would provide. *See Communities for Equity v. Michigan High Sch. Athletic Ass'n*, No. 1:98CV479, 1998 WL 804829 (W.D. Mich. Nov. 16, 1998) (order denying defendant athletic association's motion for summary judgment, *inter alia*, in which it is argued that it is not covered by Title IX).

are highly beneficial for girls, offering a panoply of physiological, psychological, sociological and mental health benefits. *See The President's Council on Physical Fitness and Sports Report: Physical Activity & Sports in the Lives of Girls* xii (Spring 1997) [hereinafter *President's Council Report*].

Athletic participation expands academic opportunities and promotes academic achievement. The availability of athletic scholarships sharply increases young women's ability to pursue a college education and to choose from a wider range of schools, thus opening more doors for women. Indeed, for many low-income women, intercollegiate athletics provides a gateway to an education that they otherwise could not obtain. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993). On average, female athletes fare better academically than their nonathletic counterparts. *See President's Council Report* at xxiii. Young women who participate in sports are more likely to graduate from high school. *See* The Women's Sports Foundation, *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students* 27 (Aug. 15, 1989). They also have higher grades and higher scores on standardized tests than non-athletes. Thus, athletic participation enhances the overall educational experiences of many young women.[38]

Second, women develop a range of skills through participation in athletics, all of which are crucial to success in employment and adult life, generally. Those skills include the ability to work with a team, to perform under pressure, to set

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[38] Athletic participation has been proven to yield similar benefits for Black and Hispanic students. Minority athletes receive higher grades, are less likely to drop out, and aspire to hold leadership positions in their communities in greater percentages than their non-participating counterparts. *See* Carol Herwig, *Report Stresses Role of Academics; High School Athletes: Winners On, Off Field*, USA Today, Aug. 16, 1989, citing Women's Sports Foundation Report: *Minorities in Sports* (1989).

goals, and to take constructive criticism. Importantly, participation in sports can teach problem-solving skills. *See President's Council Report* at 64. Participation in intercollegiate athletics offers young women "an opportunity to exacuate [sic] leadership skills, learn teamwork, build self-confidence, and perfect self-discipline." *Cohen*, 991 F.2d at 891.

Third, regular and rigorous physical exercise from sports provide enormous health benefits to women. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems. *See* Donna A. Lopiano, *Testimony Before the U.S. Subcomm. on Consumer Affairs, Foreign Commerce and Tourism*, Oct. 18, 1995. A 1998 study found that former college athletes had a 35% less chance of developing breast cancer and a 61% less chance of developing reproductive cancer compared to non-athletes. *See* Carol Krucoff, *Exercise and Breast Cancer*, Saturday Evening Post, Nov. 1995, at 22. Increased fitness levels can contribute to better posture, the reduction of back pain, and the development of physical strength and flexibility. *See President's Council Report*, at 14. In terms of emotional and mental health, women who participate in sports have a higher level of self-esteem, a lower incidence of depression, and a more positive body image. *See* Colton & Gore, Ms. Foundation, *Risk, Resiliency, and Resistance: Current Research on Adolescent Girls* (1991); The Women's Sports Foundation, *Miller Lite Report* 3 (Dec. 1985). Through participation in sports, women establish constructive relationships with peers, are influenced by healthy role models, experience success, and learn how to deal with physiological and psychological changes. *See President's Council Report* at 64. Thus, it is clear that sports participation also promises young women important health benefits.[39]

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[39] A recent book provides a comprehensive look at the impact of sports in the lives of girls and further provides a guide for parents who would like to see their daughters succeed. The authors talked with girls who play sports, professional athletes, parents, educators,

Although women continue to have a disproportionately low share of athletic opportunities, women have made a tremendous contribution to the world of sports. Indeed, female athletes triumphed in both the 1996 Atlanta and 1998 Nagano Olympic Games. And, in 1996, female athletic contributions were acknowledged in the formation of the Women's National Basketball Association, where early reports indicated that viewing and attendance of games exceeded predictions of popularity and interest. *See Gender Gaps: Where Schools Still Fail Our Children*, AAUW Educ. Found., Oct. 14, 1998 (citing G. Gross, *Girls Gleefully Claim a League of Their Own*, N.Y. Times, Aug. 4, 1997, at A1).

While Title IX's goal of full equality of opportunity in sports has yet to be realized, Title IX has played a vital role in opening up competitive athletics to women and girls. Thus, the commitment to providing young women equal opportunities in athletics must be sustained and the NCAA must not be permitted to ignore its Title IX responsibilities.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the Third Circuit's judgment in this case.

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coaches, academics, etc. The authors propose that "in raising our athletic daughters, we are raising girls to be strong, self-determined women." J. Zimmerman and G. Reavill, *Raising Our Athletic Daughters* xii (1998).

Respectfully submitted,

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APPENDIX
INTEREST OF THE AMICI

The National Women's Law Center ("Center") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX. In particular, the Center has consistently sought active enforcement of Title IX with respect to intercollegiate athletics and was counsel in the first Title IX challenge to discrimination in intercollegiate athletics, *Haffer v. Temple University*. The benefits and opportunities uniquely available to competitive athletes have been and continue to be disproportionately reserved for men. The Center has a deep and abiding interest in assuring equal athletic opportunity under Title IX, including the opportunity to participate in intercollegiate athletics.

American Association of University Women (AAUW), for well over a century, the organization of 150,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues. Current priorities include gender equity in education, reproductive choice, and workplace and civil rights issues. AAUW believes that Title IX is essential for continuing the advancement of women and girls in education.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU's Women's Rights Project was established in 1971. For nearly three decades, it has battled on behalf of women's equality in schools and other settings. Among other things, the

ACLU has appeared before this Court in virtually every major women's rights case, either as direct counsel or as *amicus curiae*. The issue presented in this case, which involves the proper scope and application of Title IX, is therefore a matter of great concern to the ACLU and its members.

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Sex Discrimination, including sex discrimination in education, Women's Health and Reproductive Rights, Family Law, Violence Against Women and Child Care.

Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination, and access to equal opportunities in athletic programs and activities. The issues raised in this case will have an enormous impact on the rights of women and girls to participate fully in educational and athletic programs free of the terrible consequences of discrimination. Thus, this case raises questions within the expertise and concern of the California Women's Law Center; and the California Women's Law Center has the requisite interest and expertise to be heard by the Court in this appeal.

Center for Women Policy Studies is a national nonprofit, multiethnic and multicultural feminist policy research and advocacy institution. The Center believes Title IX is a critical tool for ensuring educational equity for women and girls in diverse settings; the law's strength and scope of application must not be diluted. For example, the issue of sex bias in the SAT (Scholastic Assessment Test) is a major focus of our work and the Court's ruling will impact on the ability of advocates to address this bias.

Clearinghouse on Women's Issues was established some 25 years ago to provide a channel for dissemination of information

on a variety of issues of special concern to women. Advancement of educational opportunities for women and girls and elimination of discrimination in all areas of society are major issues to which we have given sustained attention. The full implementation and enforcement of Title IX has long been of great concern to our members.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF) is a statewide non-profit organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was incorporated in 1973 and has over 1,400 members. Having worked on the issue of Title IX since we first opened our doors, we understand how critical this law has been in terms of improving educational equity for girls and women, particularly in the area of athletics. We also understand that it is vital for the authoritative voice of intercollegiate athletics -- the NCAA -- to abide by Title IX if women's sports are to be truly equitable.

Equal Rights Advocates ("ERA") is a San Francisco-based public interest law center dedicated to the empowerment of women and girls through the establishment of their economic, social, and political equality. Since its inception in 1974, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits including employment, education, and public accommodations. ERA has litigated cases involving Title IX, including *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal 1993), *reconsid, granted*, 949 F.Supp. 1415 (N.D. Cal. 1996), as well as participating as amicus curiae in Title IX cases, such as *Gebser v. Lago Vista*, Indep. Sch. Dist. 118 S. Ct. 1989 (1998).

Since 1899, the *National Association for Girls & Women in Sport (NAGWS)* has championed equal funding, quality and respect for women's sports programs. NAGWS is an organization of over 5,000 professional educators whose mission is to promote and advocate for increased opportunities in

participation and leadership for girls and women in sport.

The National Association of Social Workers (NASW) is a professional membership organization comprised of more than 155,000 social workers with chapters in every state, the District of Columbia, New York City, Puerto Rico and the Virgin Islands, and an international chapter in Europe. Created in 1955 by the merger of seven predecessor social work organizations, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. In furtherance of its purposes, the NASW promulgates professional standards and criteria including *Standards for the Practice of Clinical Social Work and Guidelines for Clinical Social Work Supervision*, conducts research, publishes studies of interest to the profession, provides continuing education and enforces the *NASW Code of Ethics*. The NASW also sponsors a voluntary credentialing program to enhance the professional standing of social workers including the NASW Diplomate in Clinical Social Work and the Qualified Clinical Social Worker credentials.

National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's early and active involvement in passage of the Title IX program and NCJW's *National Resolutions*, which support "the enactment and enforcement of laws and regulations which protect civil rights and individual liberties for all," we join this brief.

National Education Association (NEA) is a nationwide labor organization with approximately 2.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions and, to this

end, firmly supports the vigorous enforcement of Title IX.

National Partnership for Women & Families, founded in 1971, formerly the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the United States Supreme Court to advance women's opportunities in education.

NAACP Legal Defense and Educational Fund, Inc. (LDF) is a nonprofit organization committed to enforcing legal protections against racial discrimination and securing the constitutional and civil rights of African-Americans. LDF has developed an expertise in civil rights litigation through the many cases in which it has participated. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing Legal Defense Fund as a "firm'... which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation"). LDF historically has had and continues to have a major role in challenging discrimination and segregation in education, representing parties or participating as *amicus curiae* in numerous education cases before the United States Supreme Court. *See, e.g., Bazemore v. Friday*, 478 U.S. 385 (1986); *Swann v. Charlotte-Mecklenberg Bd. Of Educ.*, 402 U.S. 1 (1971); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 637 (1950).

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders

of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity, including sex discrimination in intercollegiate athletic programs. For years, NOW LDEF has fought for educational equity for girls and the full enforcement of Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sex discrimination in education programs under Title IX, and joins this case because of its importance to securing equal opportunity in education.

People for the American Way Foundation (People For) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation, and conducts programs and studies directed at reducing problems of bias, injustice, and discrimination. The instant case is of particular importance in order to vindicate the fundamental principle that civil rights laws like Title IX should apply to all direct and indirect recipients of federal funding in order to fully and effectively achieve the laws' objective of combating discrimination.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that one of the most fundamental guarantees that women and girls are entitled to under Title IX is equal opportunity, which includes the enjoyment of equal rights and treatment as male athletes. Women Employed believes that women are entitled

to the same rights and opportunities as men, whether their interests lie in sports, arts, or business.

Women's Law Project (WLP) is a non-profit public interest legal center located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has a strong interest in the eradication of discrimination against women and girls in athletics and the availability of strong and effective remedies under Title IX of the Education Amendments of 1972. The WLP has worked throughout its twenty-four year history to eliminate sex discrimination in athletics and education, representing student athletes, coaches, and other players in the athletic arena in their efforts to achieve equal treatment and equal opportunity. The application of Title IX to the NCAA and to other athletic associations which operate and control the athletic programs of federally funded school programs is essential to the ultimate elimination of gender discriminatory practices in these programs.

The Women's Sports Foundation is a non-profit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and creating and educated public that supports gender equity in sports. The Foundation distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports.

The YWCA of the USA is the oldest women's membership organization in the nation. Founded in 1858, it currently serves over two million girls, women and their families through over 350 YWCAs in 4,000 locations across the country. Strengthened

by diversity, the Association draws together members who strive to create opportunities for women's growth leadership and power in order to attain a common vision: peace, justice, freedom and dignity for all people. The YWCA of the USA supports this brief because it strongly believes in the benefits that sports offer young women, and because of its conviction that young women are equally deserving of opportunities to benefit from athletic activities.